85-792

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the majority of the panel of the court below has improperly superimposed a findings requirement not contemplated by Congress upon the exemption from all other laws afforded by 49 U.S.C. § 11341(a) to consolidations approved by the Interstate Commerce Commission under 49 U.S.C. § 11344 by requiring the Commission to anticipate and enumerate at the time of its approval all legal obstacles being waived in order for the statutory exemption to be effective against a subsequent challenge.

PARTIES TO THE PROCEEDINGS

The following parties appeared in the proceedings before the Court of Appeals below:

Interstate Commerce Commission
United States of America
Denver & Rio Grande Western Railroad Company
Missouri-Kansas-Texas Railroad Company
Union Pacific Railroad Company
Missouri Pacific Railroad Company
Association of American Railroads and National Railway Labor Conference, as *Amici Curiae* in support of Petitions for Rehearing and Suggestions for Rehearing *En Banc*.

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The Interstate Commerce Commission petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A 1a-41a) is reported at 761 F.2d 714. The two Commission decisions (App. F 51a-54a and App. G 55a-68a) are unreported.

JURISDICTION

The decision of the court of appeals (App. A 1a-41a) was entered on May 3, 1985. The judgment of the court of appeals (App. B 42a-43a) was also entered on May 3, 1985. On July 12, 1985 and July 19, 1985, the panel of the court of appeals *sua sponte* amended the May 3 decision so as to remand the proceedings to the Commission (App. C 44a-45a), and amended the dissenting opinion of Judge MacKinnon (App. D 46a-47a). The timely joint petition of petitioner Interstate Commerce Com-

mission and United States and the separate petitions of the interested railroads for rehearing with suggestion for rehearing *en banc* were denied on August 9, 1985. (App. E 48a-50a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 11341, 11343, 11344 and 11347 and the Railway Labor Act, 45 U.S.C. 156 and 157 are set forth at App. H 69a-82a.

STATEMENT OF THE CASE

1. Under 49 U.S.C. 11343, the Interstate Commerce Commission has exclusive jurisdiction to approve railroad consolidations and trackage rights transactions; and under 49 U.S.C. 11344, the Commission has extraordinarily broad discretion to impose protective conditions for the benefit of other railroads to ameliorate anticompetitive impacts of the approved transaction. See *Seaboard Coast Line R.R.* v. *United States*, 599 F.2d 650, 652 (5th Cir. 1979); *Florida East Coast Ry* v. *United States*, 259 F. Supp. 993, 1001 (M.D. Fla. 1966), *aff'd*, 386 U.S. 544 (1967); and *Southern Pac. Transp. Co., et. al.* v. *I.C.C.*, 736 F.2d 708, 721 (D.C. Cir. 1984) *cert. denied*, 105 S. Ct. 1171 (1985). If the Commission approves a railroad consolidation and/or trackage rights application, 49 U.S.C. 11347 requires that the Commission impose certain provisions to protect the interests of employees adversely affected by the approved transaction. Finally, and, most importantly, once the agency grants its approval, 49 U.S.C. 11341(a) exempts a carrier, corporation, or person participating in the approved rail consolidation or trackage rights transaction from the antitrust laws and from all other laws, including State and municipal law, as necessary to let the participants carry out the approved transaction.

2. This petition for certiorari embraces an adverse opinion of a divided panel of the United States Court of

Appeals for the District of Columbia Circuit vacating two Interstate Commerce Commission decisions. The first Commission decision denied a petition by the Brotherhood of Locomotive Engineers (BLE) seeking clarification of a provision of a condition imposed to ameliorate certain anticompetitive aspects of the railroad consolidation approved some six months earlier in *Union Pacific—Control—Missouri Pacific, Western Pacific*, 366 I.C.C. 459 (1982), affirmed in relevant part, *Southern Pac. Transp. Co. et al.* v. *I.C.C.*, *supra*. The second decision denied a petition for reconsideration filed by BLE and the United Transportation Union (UTU) of the Commission's prior denial of BLE's Petition for Clarification. At issue is the Interstate Commerce Commission's interpretation of the governing exemption statute, 49 U.S.C. 11341, (adopted by at least two courts) as being self-executing so as to automatically exempt Commission approved rail consolidation and trackage rights transactions from the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA), without the need for express agency findings. In this case, the majority would have required of the Commission findings that permitting the bargaining provisions of the RLA to apply to a dispute which developed long after the Commission's approval of a combination of transactions would serve as an impediment to implementing those transactions and explaining why (App. C 45a).

3. The controversy stems from the Commission's approval of a major rail consolidation between the Union Pacific (UP), Missouri Pacific (MP), and Western Pacific (WP) railroads. In September 1980, these three large carriers applied to the Commission for approval to consolidate their operations. A number of railroads, including the Missouri-Kansas-Texas Railroad Company (MKT) and the Denver & Rio Grande Western Railroad Company (DRGW), labor organizations and States opposed the applications and sought various protective conditions. MKT applied for protective trackage rights to operate over MP's line extending between Kansas City,

KS and Omaha, NE, and stated in its proposed trackage rights agreement that it would use its *own employees* to operate its trains over the line. DRGW sought protective trackage rights to operate over MP's line between Pueblo, CO, and Kansas City, MO; and its proposed agreement included an option to operate over the line with its *own crews*.

UTU and BLE filed comments in opposition to the MKT and DRGW trackage rights applications and requested specified labor protective conditions in the event the applications were approved, but submitted no opposition to the proposed crewing terms.

In October 1982, the Commission approved the proposed consolidation, subject to several conditions to ameliorate various anticompetitive effects of the consolidation, including granting the MKT and DRGW their protective trackage rights. See *Union Pacific—Control—Missouri Pacific*, 366 I.C.C. 459 (1982), (hereinafter "*UP-Control-MP*"), *affirmed in all material respects sub. nom. Southern Pacific Transportation Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984) (*per curiam*), *cert. denied*, —— U.S. ——, 105 S. Ct. 1172 (1985) (hereinafter "*SPT*").[1] Although numerous persons sought judicial review of the Commission's decision approving the consolidation, including various organizations representing rail labor, neither BLE nor

[1] The consolidation was made subject to the usual statutorily mandated labor protective conditions as set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), *aff'd sub nom. New York Dock Railway* v. *I.C.C.*, 609 F.2d 83 (1979). The DRGW and MKT trackage rights were made subject to the statutorily mandated labor protective conditions as specified in *Norfolk & Western Ry. Co.—Trackage Right—BN*, 354 I.C.C. 605 (1978) (*N & W*), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980). 366 I.C.C. at 654, affirmed *Railway Labor Executive's Ass'n* v. *ICC*, 675 F.2d 1248 (D.C. Cir. 1982) ("RLEA"). The history and development of labor protective conditions under the IC Act are discussed and explained at some length in *RLEA*. A more detailed account of the history can be found in *New York Dock Ry.* v. *I.C.C.*, *supra*, 609 F.2d at 86-90.

UTU sought judicial review of the crewing provision in these approved trackage rights arrangements during the statutorily prescribed period for seeking judicial review.

After DRGW and MKT began their respective trackage rights operations, MKT using its own crews and DRGW initially using MP crews, a dispute arose between the involved railroads and the UTU and BLE over whether the trackage rights tenants could perform operations over MP's lines using their own crews without the consent of the unions representing MP's employees. On March 28, 1983, UTU officials threatened to strike MP if MP continued to permit crews of DRGW and MKT to operate over MP track before bargaining with its local over the terms and conditions of such use. On March 30, 1983, MP sought and received a temporary restraining order prohibiting the strike against MP in the United States District Court for the Eastern District of Missouri-Eastern Division. See *Missouri Pacific R.R. v. United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984) (appeal pending 8th Cir. No. 84-1465) (*Missouri*).[2]

[2] On March 1, 1984, in the original District Court suit in *Missouri*, *supra*, 580 F. Supp. 1490, the court issued a preliminary injunction against the union's threatened strike. In reaching its decision, the District Court found, among other things, that MP was exempted under section 11341(a) from any requirements of the RLA to negotiate concerning the crew selection clause in the approved trackage rights agreements. In granting the injunction, the District Court relied on the Commission's October 1983 order's statement that the "[p]rovisions of trackage rights agreements designating which carrier's employees will perform the trackage rights operations are material terms of the agreement and may be implemented without further approval." In this regard, the Court emphasized that MP was exempted from any RLA duty to negotiate over the selection of crews and that the Norris-LaGuardia Act restraints on a court's ability to enjoin labor strikes must give way to protect the integrity of the jurisdiction and orders of the ICC under the ICA. *Id.* at 1503. The Court emphasized further that the Commission has the right to impose conditions, in approving consolidations, that conflict with existing collective bargaining agreements and RLA procedures, noting that:

[Continued]

At about the same time, on April 4, 1983, BLE filed a petition with the Commission seeking clarification as to whether *UP—Control—MP* permitted MKT and DRGW to utilize their own crews. For the first time, the unions also questioned the Commission's power to authorize trackage rights applications that allow competitor railroads to use their own crews to operate their own trains. On May 12, 1983, the Commission denied the petition on the ground that clarification was not required and no basis had been shown for reopening *UP—Control—MP*. (App. F 54a).

BLE joined by UTU then sought reconsideration of the Commission's May 12 decision contending that (1) crew assignment disputes must be settled under the RLA; (2) the Interstate Commerce Act requirement for labor protective provisions, 49 U.S.C. 11347, prohibited MKT and DRGW from unilaterally deciding to use their own crews; and (3) even if the Commission could override the RLA and the Interstate Commerce Act labor protective provisions through its powers to exempt transactions from otherwise applicable law, the Commission failed to make the necessary findings to support the exemption.

On October 19, 1983, the Commission denied the unions' request for reconsideration. The agency specifically

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[2] [Continued]

allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

The District Court, as had the Commission, relied upon *Brotherhood of Loc. Eng.* v. *Chicago and Northwestern Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963) (*C&NW*) for its conclusion that Section 11341(a) is self-executing.

The United States Court of Appeals for the Eighth Circuit is now reviewing the District Court decision in Docket No. 84-1465, *Missouri Pacific Railroad et al.* v. *UTU*. The Commission has intervened and has requested the 8th Circuit to affirm the District Court's application of its *C&NW* decision.

found that the trackage rights agreements in issue do not change MP employees' working conditions or violate any collective bargaining agreements. The Commission emphasized that, even if the approved transaction changed the working conditions of MP employees, once the agency, pursuant to its exclusive jurisdiction under 49 U.S.C. 11344, approves the trackage rights transaction, 49 U.S.C. 11341 by its terms exempts the approved transaction from the requirements of all laws, including the RLA, as necessary to permit implementation of the transaction. The Commission relied upon *Brotherhood of Loc. Eng.* v. *Chicago and Northwestern Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963 (*C&NW*) in support of the position that no findings by it were required to bring into play the statutory exemption.

The agency also observed that nothing in the record suggested that approval of the trackage rights applications, subject to the usual labor protection conditions mandated by 49 U.S.C. 11347, would be inconsistent with the RLA. Finally, the Commission emphasized the importance and necessity of the crewing terms of the trackage rights, explaining (1) that it approved the MKT and DRGW trackage rights to ameliorate certain anticompetitive impacts of the UP-WP-MP consolidation; and (2) that MKT and DRGW would handle traffic for their own account in competition with UP-MP. The Commission thus found the crewing provisions of the trackage rights agreements to be material terms of the agreement that may be implemented without further agency approval. (See App. G 58a-68a).

4. A divided panel of the court of appeals (App. A 1a-41a) vacated, without remanding,[3] the Commission's May and October 1983 decisions and left the parties to

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[3] On July 12, 1985, the panel *sua sponte* amended its opinion so as to remand the proceeding to the Commission. The decision otherwise remained the same. (App. C 44a-45a).

whatever remedies they may have under the dispute resolution mechanisms contained in the RLA.

The court first addressed whether the unions had timely sought judicial review and found that the unions were not barred from seeking judicial review, even though their appeal was not filed within the 60 days requirements of the Hobbs Act, 28 U.S.C. 2344. The majority reasoned that the unions were justified in believing up until the Commission's denial of their petitions for clarification that the approved trackage rights agreements' crewing provisions were qualified by imposition of the *N&W* labor protective conditions. (App. A 11a-14a).[4]

Judge MacKinnon dissented. (App. A 22a-41a). He noted the majority's failure to point out any conflict between the approved trackage rights agreements and the

[4] The court of appeals acknowledged its recent ruling in *National Bank of Davis* v. *Office of the Comptroller*, 725 F.2d 1390 (D.C. Cir. 1984) (per curiam), that a party could not circumvent the time limit by first requesting the agency to reopen its decision after the period for judicial review has passed, and then raising judicial challenges to the original decision through a petition to review the agency's procedural refusal to reopen the case. However, the court held that the Commission, in stating that the *N&W* conditions would be applied to the trackage rights, created a reasonable expectation that the unions would have an opportunity to bargain over crew selection issues, notwithstanding the contrary terms of the MKT and DRG applications; and the unions, thus "had no notice of their present claim until after ICC denied their petition for clarification and reconsideration thereof." (App. A 12a).

The Commission believes the *N&W* conditions are definite in their terms and well known by the unions as not including the right of applicants' employees to bargain or require their employer to bargain on their behalf with third parties to a transaction approved by the Commission on the manner in which rights granted those third parties as a condition of approval of that transaction shall be implemented. However, because no party has ever previously raised the issue before the Commission it has never been definitively resolved and arguably the equitable exception relied on by the majority of the panel was available to petitioners as the majority concluded.

[Continued]

Commission imposed labor protective conditions, collective bargaining agreements, or rights protected by the RLA (App. A 28a-30a).

The majority of the panel of the court of appeals then reached the merits and found that the RLA dispute resolution mechanisms may not be waived without an adequate finding of necessity for doing so. In this regard, the majority below found that the Commission never made such a finding (App. A 16a-20a). Although the majority acknowledged that the Commission need not enumerate every legal obstacle waived under Section 11341(a) (App. A 16a, n.4), they still held that the Commission should have, but did not, give adequate reasons for removing crew selection from the RLA collective bargaining process (App. A 18a-21a). In reaching its conclusion on the merits, the court of appeals rejected the Commission's principle authority, *C&NW* (*Id.* at n.6, emphasis in original):

> *C&NW* did say that no *statement* of necessity was required. *Id.* at 432. To the extent that C&NW may be read to say that ICC need supply no *basis* for the necessity determination, we find the Interpretation ill-conceived and reject it.

Judge MacKinnon also dissented from the merits portion of the majority's decision (App. A 28a-41a). He pointed out the inapplicability of the cases relied upon by the majority to support its requirement of express findings of necessity and the failure of the majority to come to grips with the holdings of the Eighth Circuit in *C&NW*, *supra*, this Court in *Schwabacher* v. *United States*, 334

[4] [Continued]

Although the Commission believes Judge MacKinnon's position is analytically more sound—absent reason to believe the right existed, petitioners should have been held to the 60 days time limit provided in the Hobbs Act (App. A 22a-28a)—we do not challenge this aspect of the court of appeals decision. In addition, there is an alternative view of the development of the instant case discussed *infra* at n.9, under which the timeliness holding of the majority is unquestionably correct.

U.S. 182 (1948), and the reasoning of the decision of the District Court in the *Missouri* case which respondents below had relied upon and urged the court below to adopt.[5] (App. A 31a-38a).

Although disagreeing with the majority view that specific findings of necessity must be expressly enunciated to effect a displacement of RLA procedures, Judge MacKinnon found ample explication by the Commission in light of the undisputed necessity for imposing the trackage rights conditions to offset competitive effects of the principal consolidation, the likelihood that that purpose would be frustrated by requiring the negotiations sought by rail labor, and the fact that the now asserted conflict with existing collective bargaining agreements was never raised before the Commission (App. A 38a-41a).

Subsequently, the Commission (joined by the United States) and the affected railroads petitioned for rehearing with suggestion for rehearing *en banc*. On July 12, 1985, the panel *sua sponte* amended its opinion so as to remand the proceeding to the Commission. Subsequently, the original court panel and the court *en banc*, respectively, denied the petitions for rehearing and suggestion for rehearing *en banc* (App. E 48a-50a).[6]

REASONS FOR GRANTING THE WRIT

The holding of the majority of the panel of the court below incorrectly determines an important question of federal law in a manner which conflicts with the decision of another United States Court of Appeals and of a United States District Court. It creates a chaotic situa-

[5] Because the Commission continues to believe the decision of the District Court in *Missouri* represents a cogent and correct application of appropriate legal principles to this case, a copy is appended as Addendum A for the convenience of the court.

[6] Senior Circuit Judge MacKinnon, who dissented in the initial adverse court of appeals decision, would have granted the petition for rehearing, and Circuit Judge Starr would have granted the suggestion for rehearing *en banc*.

tion in the area of labor relations in the railroad industry and severely and inappropriately burdens the Commission's exercise of its plenary authority to approve rail consolidations.

(1) Section 11341(a) of Title 49 U.S.C. provides in relevant part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in . . . a transaction approved by or exempted by the Commission under this subchapter . . . is exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction.

Plainly, the exemption provided by that section is self-executing and is contingent only upon the Commission's approval of the transaction under the subchapter involved.

There is no dispute that the Commission approved the transactions in question under the relevant subchapter in *UP—Control—MP*, *supra*, including the MKT and DRGW trackage rights which are the subject of the instant litigation, and that the Commission's approval was affirmed in all material respects by the court below in *SPT*, *supra*.[7] Nor is there any dispute that petitioners below never raised before the Commission, in connection with agency approval of the involved transactions, any of the arguments subsequently presented to the Commission and to the court below in support of labor's position—that Commission approval of the MKT and DRGW trackage rights agreements (wherein it was clearly specified that the

[7] Under these circumstances, it is arguable, as petitioner argued in a motion to dismiss which was carried by the court below along for determination in connection with decision on the merits, that the petitions for review were time barred by virtue of not having been filed within 60 days of service of the Commission's decision approving the various transactions. For reasons set forth in footnote 4, *supra*, and footnote 9, *infra*, petitioner does not press this argument.

trackage rights tenants would have the right to use their own crews) did not foreclose the MP locals from their RLA rights to negotiate the crewing issue.

The only issue, therefore, is whether the Commission was required anticipatorily to make findings explaining why, if an issue such as that subsequently posited by the unions representing MP employees arose, it would be necessary to exclude resolution of that issue from the reach of the RLA in order for the statutory exemption from all other laws to take effect.

The majority below held that the Commission was required to do so.[8] Judge MacKinnon, dissenting, and the District Court, relying on the Eighth Circuit's contrary decision in *C&NW*, concluded otherwise, and in any event concluded that the Commission in connection with denial of clarification had adequately explained its position.[9]

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[8] In amending its decision so as to remand the matter to the agency rather than simply vacating the Commission's decision, the majority of the panel instructed the agency as to the sort of findings, that in its view are required (App. C 45a):

> The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted rights to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

[9] Viewed in the latter manner, there can be no doubt about the correctness of the majority's Hobbs Act timeliness ruling; but similarly, there can be no doubt that the issue of crewing was removed from the reach of the RLA, absent a showing of lack of nexus between the transaction approved and the relief from the operation of other laws such as that found in *City of Palestine Texas* v. *United States*, 559 F.2d 408 (1977).

No such showing was ever attempted here. Under long standing and well settled principles of judicial review, the burden was upon

(2) Not only the plain meaning of the statute but also its legislative history and Commission and court precedent demonstrate the incorrectness of the interpretation of Section 11341(a) adopted by the majority of the panel below. In connection with its approval of the underlying transactions out of which the instant disputes arose, the Commission explained its view of the statutory exemption provision as self executing and extending to relieving Commission approved consolidations from the provisions of the RLA, citing the Eighth Circuit's *CNW* decision. *UP—Control—MP*, 366 ICC at 556-557. Again, in this very proceeding, in explaining to BLE and UTU why reconsideration of denial of clarification was unnecessary, the Commission set forth in detail the basis for its view that approval of a transaction must permit changes in working conditions necessary to effectuate the approved transaction to be negotiated pursuant to the mechanisms provided for in its labor protective conditions, rather than pursuant to the RLA if the Commission's authority to approve such transactions is not to be vitiated (App. G 59a-60a). In addition, it explained, by reference to the *CNW* decision, why in its view making specific findings to this effect was not required either in general or in this proceeding (App. G 60a-61a).

Even more recently, the Commission explained in even greater detail in Finance Docket No. 30532, *Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific LTD. And Springfield Terminal Railway Company Exemption From 49 U.S.C. 11342 and 11343* (decided August 22, 1945) (Appeal pending in Docket No. 85-1636 *Railway Labor Executives' Ass'n and United Transportation Union* v. *United States and Interstate*

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the party seeking judicial review to establish the lack of a nexus, not upon the agency to establish a nexus as would be required by the remand instructions of the majority (quoted at n.8, *supra*). See *I.C.C.* v. *Jersey City*, 322 U.S. 503, 512-13 (1944) (ICC orders presumed valid).

Commerce Commission (D.C. Cir.)). (Attached as Addendum B.) why the provisions of the RLA must be deemed to be "reflected and subsumed in the conditions imposed by the Commission." (Add.B 49a) As explained by the Commission, such a result is essential if transactions approved by the agency are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. The decision explained that the Commission's labor protective conditions provide for compulsory binding arbitration,[10] whereas the RLA does not (Add.B 50a):

> Under RLA, however, changes in working conditions are generally classified as major disputes with the result that there is no requirement of binding arbitration. See *REA Express, Inc.* v. *B.R.A.C.*, 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unacceptable and inconsistent with section 11341 of our act and of Section 7 of the RLA which provides that arbitration awards thereunder may not diminish or extinguish any of our powers under the Interstate Commerce Act. [Footnote Eliminated]

The *C&NW* decision, *supra*, 314 F.2d 424, which petitioner believes is controlling, properly interprets the scope of former Section 5(11), presently Section 11341 (a), of the Interstate Commerce Act. That decision, as principally relevant to resolution of the matters presented in the instant controversy, held that (1) the Commission's power to approve consolidations includes the power to approve transactions which require the negotiation of changes in working conditions and to

[10] The majority below clearly recognized that compulsory binding arbitration was a central feature of the Commission's protective conditions (App. A, 6a).

establish the means by which negotiation of such changes shall be effected; (2) that, if the Commission does so, RLA processes for resolving labor problems arising directly out of the approved transactions are overridden by virtue of Section 5(11) (now Section 11341(a)); and (3) that the terms of that section are self executing so as to obviate the need for the Commission to declare that a carrier is being relieved from any particular restraints.

The court in *C&NW* found support for its conclusions in applicable legislative history of the Interstate Commerce Act and decisions of this Court interpreting the same (314 F.2d at 430-31). The court pointed out that Congress rejected the Harrington amendment which, if adopted, would have brought about a freeze of existing employee job rights and thereby would have threatened to prevent all rail consolidations, *Id.* at 430.[11] As further support for its conclusion, that court stated (*Id.* at 431):

> Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

See also *Nemitz* v. *Norfolk and Western Railway Co.*, 287 F. Supp. 221, at 226-227 (U.S.D.C. N.D. Ohio 1968); and *Nemitz* v. *Norfolk and Western Railway Company*, 436 F.2d 841 at 845 (6th Cir. 1971), *affirmed* in *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971).

[11] Most particularly the *C&NW* decision relied upon this Court's holding in *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U.S. 169 (1961) that examination of the legislative history of former section 5(2)(f) (now 49 U.S.C. 11347) supports the Commission's position that no freeze of existing working conditions of the sort that would have been provided by the Harrington Amendment was contemplated by that Section.

Similarly, as Judge MacKinnon noted with approval in adopting the reasoning of that decision (App. A 41a) the District Court in *Missouri, supra* (580 F.Supp. at 1505; Add. A 28a), founded its decision enjoining the threatened strike by MP employees over the crewing issue on the basis that:

> allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Such a result, of course, is invited by the decision of the majority of the panel of the court of appeals herein.

(3) The majority of the panel of the court of appeals in a footnote rejected the previously unassailed holding of *C&NW* (App. A 18a n.6):

> The government claims that *C&NW* stands for the proposition that the immunity is automatic and requires no finding of necessity. However, *C&NW* fails to carry the day for several reasons. First, *C&NW* itself recognized that immunity attached only to obstacles that would frustrate fruition of the merger. *Id.* at 432. Second, *C&NW* distinguished, but did not disagree with, *Texas & New Orleans R. Co.* v. *Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). 314 F.2d at 433. And third, *C&NW* did say that no statement of necessity was required. *Id.* at 432. To the extent that *C&NW* may be read to say that ICC need supply no *basis* for the necessity determination, we find the interpretation ill conceived and reject it.[12]

Because of the court of appeals majority's rejection of *C&NW*, there is now a split in the Circuits on the

[12] The majority of the panel in its decision relies heavily upon *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). That case recognized that ". . . . Section [11341(a)] relieves carriers of the restraints and limitations of other laws" (*Id.* at 156) and that "if it

important issue of the self-executing nature of Section 11341(a) of the Interstate Commerce Act and its relationship with other laws in general and the RLA in particular.

(4) The holding of the majority of the panel has already created a chaotic situation with respect to labor relations in the railroad industry.[13] More importantly

should be determined that the Commission's authority under Section [11343] is being frustrated by application of Norris-LaGuardia to the present suit we would have to conclude that Norris-LaGuardia was preempted." (*Id.* at 158). Here, for reasons set forth by Judge MacKinnon in his dissenting opinion (App. A 38a-41a) and the District Court's *Missouri* decision (Addendum A), it is clear that permitting negotiation under the RLA with a concomitant right to strike over crewing of trackage rights operations by MKT and DRGW would frustrate the Commission's approval of the proposed consolidation. Accordingly, under even the authority relied upon by the majority of the panel, the Commission's decisions under review ought to have been affirmed.

[13] Besides *Missouri, supra*, labor unions have filed suits in various forums throughout the United States which claim that the RLA procedures must be followed before changes in working conditions contemplated by various Commission approved transactions can be effected. The following are a few examples of pending cases which raise this issue:

(1) No. 85-3875, *RLEA* v. *Butte, Anaconda and Pacific Railway, Company*, (U.S.C.A., 9th Cir.) (Union contends that the railroad must follow RLA procedures before making changes in working conditions resulting from the sale of rail properties to the State of Montana which, in turn, leased such properties to a non-carrier);

(2) No. 85-7483, *RLEA* v. *Staton Island Railroad Corp., Et Al.* (U.S.C.A., 2d Cir.) (Appeal of District Court dismissal of a case wherein the Union contended that RLA procedures must be followed in an approved transaction involving the sale of rail properties under Section 10905;

(3) No. 85-C-7538, *RLEA, Et Al.* v. *Soo Line Railroad Company and the Milwaukee Road, Inc.* (U.S.D.C. N.D. Ill.) Unions claim railroads must follow the RLA procedures before making changes in working conditions resulting from the Soo Line Railroad's acquisition of the core rail

from the Commission's perspective, if applied to potential conflicts with other laws (there is every reason to suppose it will be in view of the broad language used by the majority), the interpretation adopted by the majority will severely curtail, if not paralyze, the Commission's exercise of its jurisdiction to approve rail consolidations. As the majority itself acknowledged (App. A 16a, n.4):

> A requirement . . . [that the ICC must enumerate every legal obstacle that is waived in its approval] . . . might undermine the approval authority's purpose of "facilitat[ing] merger and consolidation in the national transportation system," *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958), because some legal obstacles to fruition of the transaction may not be entirely foreseeable at the time of approval. But the ICC's decisionmaking process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction.

However, the Court's holding—that the determination of which obstacles the agency is required to foresee and waive before the approved transaction surmounts them is a matter for the courts to determine after the fact—imposes the very obligation on the agency which the Court found would undermine the agency's exercise of its consolidation authority. In the absence of any suggestion by any party before the agency that an obstacle is present, the holding of the majority creates an impossible situation because it requires the agency to foresee

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properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and

(4) No. 84-3703-T, *International Association of Machine and Aerospace Workers* v. *Boston & Maine Corp., Et Al.* (U.S.D.C. Mass.) (Unions assert the right to bargain collectively over changes in working conditions resulting from Commission approval of Guilford Transportation Industries, Inc.'s control of the Boston & Maine Railroad.

and make findings with respect to *all* conceivable obstacles before they are removed as impediments. Neither the agency nor the industry regulated by it can, or should be required to, live with the uncertainty attendant upon such an approach.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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NOVEMBER 1985

ADDENDUM A

UNITED STATES DISTRICT COURT
E.D. MISSOURI, E.D

No. 83-771C(1)

MISSOURI PACIFIC RAILROAD COMPANY, PLAINTIFF

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
INTERVENOR-PLAINTIFF

v.

UNITED TRANSPORTATION UNION,
GENERAL COMMITTEE OF ADJUSTMENT, ET AL.,
DEFENDANTS

March 1, 1984

Nina K. Wuestling Mark M. Hennelly, St. Louis, Mo., for plaintiff.

John Clarke & John J. Sullivan, Washington, D.C., Joe C. Crawford, Dallas, Tex., David R. Herndon, E. Alton, Ill., Charles Allen Seigel, St. Louis, Mo., for defendants.

MEMORANDUM

NANGLE, Chief Judge.

This case is now before this Court on the motion of plaintiff Missouri Pacific Railroad Company (herein-

after "MOPAC") and intervenor-plaintiff Missouri-Kansas-Texas Railroad Company (hereinafter "KATY") for a preliminary injunction enjoining defendants and their members from striking either railroad.[1] In addition, there are several other motions which are now pending before this Court. These include: 1) defendants' motion to refer two (2) issues to the Interstate Commerce Commission pursuant to 28 U.S.S. § 1336(b); 2) plaintiffs' motions for summary judgment on its complaint and dismissal of or summary judgment on defendants' counterclaims; and 3) defendants' cross-motion for summary judgment on plaintiffs' complaint.

I MOTION FOR PRELIMINARY INJUNCTION

The motion for a preliminary injunction was submitted to this Court on a stipulated record consisting of the following: 1) a stipulation of fact[2]; 2) the affidavit

[1] On February 7, 1984, this Court granted plaintiffs' motion for a preliminary injunction. At that time this Court issued a very brief memorandum which stated in summary fashion the reasons for granting plaintiffs' motion. This Court indicated that a more complete and detailed explanation of this Court's ruling would be forthcoming. The memorandum filed herein this day is the memorandum promised. However, in addition to discussing plaintiffs' motion for a preliminary injunction, this memorandum addresses the pending motions for referral to the Interstate Commerce Commission and for summary judgment.

[2] The manner in which the parties developed the record for this motion was poor to say the least. As stated in this Court's *Memorandum* dated February 7, 1984, the parties stipulated to a record in this case during an in-chambers conference, held on-the-record, on February 1, 1984. It was represented that a so-called "Stipulation of Fact" existed and had been filed along with the parties' pre-trial material. The file contained a document captioned "Stipulations", which had been filed by plaintiffs, and it contained the signatures of counsel for MOPAC and KATY only. It did not contain the signature of any representative of UTU. It was not until February 6, 1984, that this Court received and filed a copy of the "Stipulations" with a signature of counsel for UTU on it. However, even this document does not contain the signature of KATY's counsel. This Court assumes that, given the fact that counsel for KATY's signature appears on a copy of this document elsewhere in the file, it is a valid and binding stipulation of fact.

of Irving Newcomb which, *inter alia*, attests to the accuracy of the facts stated in defendants' (hereinafter "UTU") "Statement of Facts" contained in *Memorandum of Defendants in Support of Their Cross-Motion To Dismiss, etc.* at 2-12; and 3) the affidavit of O.B. Sayers which, *inter alia*, attests to the accuracy of the facts stated in plaintiff MOPAC's "Background Facts" contained in *Memorandum of Plaintiff Missouri Pacific Railroad Company In Support of Its Motions, etc.* at 4-8. In addition, this Court takes judicial notice of the orders of the Interstate Commerce Commission (hereinafter "ICC") entered in connection with the application of MOPAC to consolidate with the Union Pacific Railroad Company (hereinafter "UPRR"). *Fed.R.Ev.* 201. This Court, having considered the record in this case, the pleadings, briefs and exhibits submitted in support of and in opposition to the motion for a preliminary injunction, hereby makes the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

1. Plaintiff MOPAC is a common carrier regulated by the Interstate Commerce Commission ("ICC"). MOPAC offers rail freight transportation over 11,500 miles of railroad; its principal north-south lines extend to Louisiana and Texas from Chicago via St. Louis and from Omaha via Kansas City.[3]

2. Intervenor KATY is a common carrier regulated by the ICC. KATY offers rail freight transportation

[3] Paragraphs 1 through 13 of these "Findings of Fact" are substantially verbatim portions of the "Stipulation" signed by the parties. MOPAC is sometimes referred to as "MPRR" or "MP" and KATY is sometimes referred to as "MKT".

over 2,100 miles of railroad; its major lines serve San Antonio, Houston and Galveston. Until January, 1983, the northern-most points served by KATY were St. Louis and Kansas City.

3. Defendant UTU is a railway labor organization duly authorized, under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to represent certain employees of MOPAC and KATY who are members of the crafts or classes of conductors, brakemen, yardmen, firemen, hostlers and helpers. All other defendants are agents and officials of UTU and/or the General Committee of Adjustment for MOPAC.

4. MOPAC has several agreements with UTU that govern certain rates of pay, rules and working conditions of UTU members employed by MOPAC. One agreement, last rewritten December 1,1982, applies to the crafts or classes of locomotive firemen, hostlers and hostler helpers; a second agreement, last rewritten September 1, 1979, applies to the crafts or classes of conductors, trainmen and yardmen.

5. On September 15, 1980, UPRR and MOPAC submitted to the ICC applications for approval of their proposed consolidation. These applications were submitted pursuant to the Interstate Commerce Act, 49 U.S.C. § 11344. From March, 1981, until January, 1982, the ICC held extensive hearings on these applications.

6. UTU participated in the ICC proceedings, opposing the applications and seeking conditions that would protect railroad employees affected by the transportations. KATY participated in the proceedings and opposed the consolidation; alternatively, if the consolidation were approved, KATY sought "trackage rights" that would allow it to operate over MOPAC tracks between, among other points, Kansas City, on the one hand, and Council Bluffs, Iowa, Omaha, Union, Lincoln and Atchison, Nebraska, and Topeka, Kansas, on the other hand. *See* ICC Finance Docket 30,000 (Sub-No. 25). MOPAC opposed the trackage rights condition sought by KATY. The

trackage rights application of KATY was filed in January of 1981 and the proposed trackage rights agreement included therein provided: "MKT, with its own employees, at its sole cost and expense, *shall* operate its engines, cars and trains on and along Joint Track." *See* F.D. No. 30,000 (Sub-No. 8) *et al.* (October 19, 1983), at 8 (emphasis added).

7. By decision and order dated October 20, 1982, the ICC approved the consolidation of UPRR and MOPAC, as well as the application of KATY for trackage rights, over MOPAC lines between Kansas City, on the one hand, and Council Bluffs, Iowa, Omaha, Union, Lincoln and Atchison, Nebraska, and Topeka, Kansas, on the other hand. *Union Pacific Corp., et al.—Control—Missouri Pacific Corp.*, 366 I.C.C. 459, 642, 653 (1982); *pet. for rev. pending*, D.C.Cir. Nos. 82-2253, *et al.* The ICC's Order provided that the trackage rights, which it concluded were necessary to ameliorate competitive effects of the approved consolidation, would be effective immediately upon consummation of the consolidation. The ICC's Order did not specify compensation terms, but allowed the parties to negotiate such terms. In a recent decision of the ICC, Finance Docket No. 30,000 (Sub-No. 25), the ICC recognized that it has plenary authority to impose such trackage rights under the Interstate Commerce Act, 49 U.S.C. § 11341, *et seq.*

8. The ICC's Order approving the trackage rights requested by KATY in F.D. 30,000 (Sub-No. 25) provided that the trackage authority was "subject to employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.-Trackage Rights-BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.-Lease and Operate*, 360 I.C.C. 653, 664 (1980)." 366 I.C.C. at 654 (¶ 19). These conditions are commonly referred to in the railroad industry as the "Norfolk and Western" conditions (hereinafter "N & W").

9. On November 9, 1982, UPRR, MOPAC and KATY filed with the ICC a "Stipulation" reflecting their agree-

ments in principle on the terms and conditions of the anticipated trackage rights operations (other than permanent compensation terms). The Stipulation provided that "the parties will enter into a standard form trackage rights agreement to implement KATY's trackage rights."

10. The consolidation of UPRR and MOPAC was effected on December 22, 1982. By letter dated December 31, 1982, MOPAC advised the General Chairman of UTU, among others, that KATY was expected to initiate trackage rights operations on January 3, 1983, and that "[n]o Missouri Pacific employees will be adversely affected as a result of the utilization of these trackage rights . . . ." In response, R.D. Hogan of UTU sent a letter dated January 4, 1983, to O.B. Sayers of MOPAC, which stated in part:

> The Katy Railroad has no terminals north of Kansas City, Missouri and prior to this time has not handled any service beyond that point. This service has traditionally been handled by the employees we represent on the Missouri Pacific (Proper) Railroad, and it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected by Missouri Pacific (Proper) road crews. Request is hereby made that such service be protected as indicated above.

11. On January 5, April 11 and April 13, 1983, the KATY entered into separate agreements with representatives (the UTU) of its engine and train service employees concerning the implementation of the trackage rights over MOPAC's track as authorized in Finance Docket 30,000 (Sub-No. 25).

12. KATY, using KATY employees, initiated operations over the trackage rights on or about January 6, 1983. KATY is presently using its own employees to

pickup and set-out rail cars at Atchison and Union, Nebraska and at Council Bluffs, Iowa.

13. The formal terms and conditions (other than the terms of the compensation owed MOPAC for KATY's trackage rights) are set forth in a standard form trackage rights agreement filed with the ICC March 9, 1983 ("the Trackage Rights Agreement"). The Trackage Rights Agreement recognizes that KATY "shall, with its own employees, at its sole cost and expense, operate its trains, locomotives and cars over" MOPAC's Omaha-Kansas City line.

14. By Mailgram dated March 28, 1983, and directed to MOPAC, UTU officials Newcomb and Hogan stated, as follows:

> The undersigned representing conductors, road brakemen, yardmen, firemen, hostlers, and hostler helpers on the Missouri Pacific (proper) have exhausted our patience and goodwill in attempting to have you stop the use of MKT employees manning freight over Missouri Pacific lines between Kansas City and Omaha. This will serve as notice that if arrangements are not made to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees, the employees under the jurisdiction of our committees will peacefully withdraw from service on those parts of the Missouri Pacific Railroad under our jurisdiction at 12:01 AM April the 4th 1983.

15. On March 30, 1983, MOPAC filed its complaint, against the UTU and several of its officers, under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same day this Court granted a Temporary Restraining Order prohibiting defendants from engaging in any strike or related activities against plain-

tiff. Thereafter, KATY intervened as a plaintiff and joined in MOPAC's request for relief. The UTU also filed a counterclaim against MOPAC and KATY alleging, in two (2) counts, that MOPAC violated the Railway Labor Act and that MOPAC and KATY violated the terms of the ICC's Order approving the application of KATY for trackage rights. The Temporary Restraining Order was extended beyond the ten (10) day limit of Rule 65(b), *Fed.R.Civ.P.* 65(b), several times by agreement of the parties. The last such extension expired at 10:00 A.M. on February 7, 1984.

16. MOPAC has numerous trackage rights arrangements whereby other carriers, including KATY, operate over its lines and whereby MOPAC operates over the lines of other carriers, including KATY.

17. Article 1, § 4 of the N & W conditions provides, in pertinent part, as follows:

> When the railroads contemplate a transaction, they shall give at least twenty (20) days' written notice of such intended transaction . . . .
>
> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the [N & W conditions] shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

354 I.C.C. at 610-611. With respect to KATY's trackage rights over MOPAC lines, neither MOPAC nor KATY

gave the notice called for by Art. I, § 4, to MOPAC employees. However, several conferences concerning the grant of trackage rights to KATY were held between, *inter alia*, Irving Newcomb for UTU and O.B. Sayers for MOPAC. These conferences occurred between January 4, 1983, and March 28, 1983. According to Mr. Newcomb, at a conference held on March 7, 1983:

> [T]he UTU requested MoPac to negotiate with the UTU regarding (1) the transfers to MKT of the right to operate over MoPac tracks to perfrom work previously performed by MoPac operating employees, and (2) the effects of such a transfer of operating rights on MoPac employees represented by UTU.

Off. of I. Newcomb, ¶ 3. Mr. Newcomb states that MOPAC refused this request, relying upon actions and orders of the ICC. *Id.*

18. On May 12, 1983, the ICC isused a decision denying the petition of the Brotherhood of Locomotive Engineers (hereinafter "BLE") for clarification of the ICC's decision approving the consolidation of UPRR and MOPAC. F.D. No. 30,000 (Sub-No. 18) *et al.* (May 12, 1983). The ICC summarized the position of BLE, as follows:

> BLE seeks to have the consolidation decision clarified with respect to whether MKT . . . may use their own operating crews in performing trackage rights operations over MP lines. It asserts that this commission has no jurisdiction over crew assignment matters and that our decision should not be construed as authorizing MKT . . . to use their own crews in the performance of the approved operations. It indicates that these matters are subject to settlement in accordance with the Railway Labor Act and are not within the scope of our decision

approving the responsive trackage rights applications.

Id. at 2-3. In denying BLE's petition the ICC stated:

> Inasmuch as . . . MKT proposed in [its] applications that the operations would be performed with [its] own crews, our approval of the applications authorizes such operations. Our decisions of November 24, 1982, and January 18, 1983, unambiguously specified that trackage rights tenants may perform operations using their own crews.

Id. at 4. Moreover, the ICC added:

> We have broad authority to impose conditions on consolidations and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews.

Id. at 5.

19. On June 16, 1983, UTU sent a letter to several carriers, including MOPAC and KATY, requesting that those carriers "comply fully with [the] advance notice and negotiation requirements" of Art. I, § 4 of the N & W conditions.

20. MOPAC rejected UTU's request in a letter dated June 23, 1983. MOPAC interpreted UTU's letter as a request to enter into negotiations aimed at reaching a "single implementing agreement" with respect to the selection of forces for trackage rights tenants. MOPAC, relying on the May 18, 1983, order of the ICC which "confirm[ed] the inability of MPRR and UPRR to bind their trackage rights tenants to an agreement regarding selection of forces", stated that "it would be inappropriate and unproductive for MPRR and UPRR to participate in" a meeting or negotiations aimed at reaching such an agreement. However, MOPAC's letter did express a willingness to negotiate with UTU "issues of

mutual interest arising from the recently approved consolidations . . ."

21. KATY responded to the UTU in a letter dated June 22, 1983. KATY also rejected the UTU's request, relying on the ICC's orders and the fact that it had already met and negotiated implementing agreements with its own employees who are represented by the UTU.

22. On June 29, 1983, the UTU filed a pleading with the ICC which sought reconsideration of the ICC's May 18, 1983, denial of the petition for reconsideration. In that pleading the UTU asked the ICC to rule:

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights operations, (2) did not receive the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective provisions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

23. The ICC rejected *all three* of the UTU's arguments in a decision dated October 19, 1983. F.D. No. 30,000 (Sub-No. 18) *et al.* (October 19, 1983). The ICC stated:

> Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Id. at 4-5. The ICC further concluded that:

> Provisions of trackage rights agreements designating which carrier's employees will perform trackage

rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

24. The strike threatened by UTU will cause a disruption of service to MOPAC and its shippers, and result in severe, immediate and irreparable injury to MOPAC. MOPAC, which operates over 3,400 trains per week, carrying 2,300,000 tons of freight, would be placed in serious jeopardy by the threatened strike. The injury to MOPAC's thousands of shippers, especially those exclusively served by MOPAC, would be irreparable. *Aff. of O.B. Sayers*, ¶ 4.

B. CONCLUSIONS OF LAW

1. INTRODUCTION

This action arises under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.* This Court has subject matter jurisdiction under 28 U.S.C. § 1331(a) and 1337.

Plaintiff and plaintiff-intervenor's complaints seek preliminary and permanent injunctive relief against defendants' threatened strike. Plaintiffs contend in their complaints that the dispute which gives rise to this action concerns the interpretation and application of the collective bargaining agreements between MOPAC and UTU. According to plaintiffs, the dispute is therefore a "minor" dispute within the meaning of the RLA and defendants are required by § 153 of the RLA to submit the dispute to the exclusive jurisdiction of the National Railway Adjustment Board (NRAB) rather than strike. Plaintiffs also allege that defendants' strike would violate § 152, First of the RLA, which requires carriers and

employee representatives to exert every reasonable effort to settle disputes, because defendants failed to invoke the binding arbitration provisions of the employee protective conditions that were imposed by the ICC. *See Finding of Fact No. 8.* Additionally, plaintiffs contend that defendants' proposed strike action is barred by the doctrines of estoppel, collateral estoppel, and res judicata.[4]

Defendants counterclaimed for declaratory and injunctive relief. In Count I of their counterclaim defendants allege that MOPAC violated § 156 of the RLA by unilaterally changing the actual and objective working conditions of its employees, i.e., by authorizing KATY to operate over MOPAC tracks with KATY crews, without complying with the notice and negotiation requirements of § 156. In Count II defendants allege that both MOPAC and KATY violated Article 1, §§ 2 and 4 of the N & W conditions imposed by the ICC, *see Finding of Fact No. 8*, by not preserving working conditions that prevailed prior to the transaction (Art. 1, & 2), and by failing to give twenty (20) days prior notice and to negotiate over the selection of forces to operate the trackage rights (Art. 1, § 4). Defendants seek an injunction requiring plaintiffs to restore the status quo that existed prior to the trackage rights transfer, prohibiting trackage rights operations until plaintiffs comply with Article 1, section 4 of the N & W conditions, and making all employees whole for their losses due to plaintiffs' alleged infractions.

Plaintiffs' motion for a preliminary injunction against defendants' proposed strike presents a unique and com-

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[4] This Court declines to express an opinion as to the merits of these claims. The record on these questions is not adequate to make any findings concerning the collateral estopel or res judicata effect of the ICC proceedings in the case at bar. The same is true of the estoppel and bar claim. Moreover, this Court's disposition of plaintiffs' other claims herein makes it unnecessary for this Court to determine these questions at this time.

plex problem. The decision whether to enjoin defendants' threatened strike requires this Court to reconcile several federal statutes: 1) the Norris-LaGuardia Act (hereinafter the "NLGA"), 29 U.S.C. § 101 *et seq.*; 2) the Railway Labor Act (hereinafter the "RLA"), 45 U.S.C. § 151 *et seq.*; and 3) the Interstate Commerce Act (hereinafter the "ICA"), 49 U.S.C. § 11341 *et seq.* Essentially, defendants argue that the NLGA deprives this Court of the power to issue an injunction against defendants' threatened labor strike. Because this Court declines to read the NLGA in a vacuum, defendants' argument must be rejected. This Court will first address the NLGA problem and then will analyze the four (4) traditional criteria for determining whether preliminary injunctive relief is warranted.

2. DOES THE NORRIS-LaGUARDIA ACT BAR A LABOR INJUNCTION IN THIS CASE?

Section 104 of the NLGA provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . . .

29 U.S.C. § 104. In addition, § 108 of the NLGA provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute

> either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. § 108. Defendants contend that § 104 deprives this Court of jurisdiction to enjoin defendants' threatened strike. Alternatively, defendants argue that if this Court does have jurisdiction to enjoin defendants' threatened strike, then injunctive relief must be denied because plaintiffs have not met the requirements of § 108.

Plaintiffs respond that the underlying labor dispute is a "minor" dispute within the meaning of the RLA and, therefore, the NLGA is no bar to the power of this Court to enjoin defendants' threatened strike. Alternatively, plaintiffs argue that if the underlying labor dispute is a "major" dispute within the meaning of the RLA, then plaintiffs are exempt, under the ICA, from any duty to negotiate with defendants concerning crew selection for KATY's trackage rights and the NLGA must give way to the power and jurisdiction of the ICC in this situation. Plaintiffs do not specifically address defendants' § 108 argument.

As stated in this Court's order of February 7, 1984, and as explained more fully below, this Court holds that: 1) this is a "minor" dispute within the meaning of the RLA, and, therefore, § 104 of the NLGA does not bar a labor injunction; 2) alternatively, if this is a "major" dispute within the meaning of the RLA, defendants' proposed strike would be illegal because plaintiffs have no duty to negotiate with defendants concerning crew selection for KATY's trackage rights, and § 104 of the NLGA must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and 3) § 108 of the NLGA does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. Each of these three (3) will be discussed in turn below.

a. THIS IS A "MINOR" DISPUTE AND THE NORRIS-LaGUARDIA ACT DOES NOT BAR A LABOR INJUNCTION

The RLA, which governs labor relations in the railroad industry, draws a signficant distinction between "minor" disputes and "major" disputes. In an often-quoted passage, the Supreme Court described the distinction, as follows:

> [Major disputes] relate . . . to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [Minor disputes], however, contemplate . . . the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . In either case the claim is to rights accrued, not merely to have ones created for the future.

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886 (1945). *See also Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 33, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277-78 (7th Cir. 1981); *International Brotherhood of Teamsters, etc. v. Braniff International Airways, Inc.*, 437 F.2d 1272, 1274 (5th Cir. 1971). The distinction between the two types of disputes is significant because it

affects the procedure for settling disputes and the applicability of the NLGA's prohibition against federal court labor injunctions.

If a dispute is a "minor" dispute and it cannot be resolved by the normal grievance procedure, then the parties must submit their differences to the NLRB, the jurisdiction of which is exclusive. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972); *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. For this reason, a strike over "minor" disputes violates the RLA and may be enjoined by a federal district court, the prohibitions of the NLGA notwithstanding. *Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33, 83 S.Ct. 1059, 10 L.Ed.2d 172 (1963); *Chicago River*, 353 U.S. at 40-42, 77 S.Ct. at 640-641; *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. On the other hand, "[i]f the dispute is 'major', . . . the union may strike to secure its position if after negotiation between the parties, mediation by the National Mediation Board, and, possibly, a review and report by an emergency board appointed by the President, a settlement is not reached." *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. *See also Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819, 84 S.Ct. 55, 11 L.Ed.2d 53 (1963).

Strikes over "minor" disputes may be enjoined despite the NLGA, because such strikes violate the mandate of the RLA that such disputes be conclusively resolved through the NRAB machinery created by the RLA. In *Chicago River* the Supreme Court held that the earlier and general provisions of the NLGA must be accommodated to the later and more specific provisions of the RLA. 353 U.S. at 40-42, 77 S.Ct. at 640-641. The Court also explained that the NLGA prevents the issuance of an injunction against a railway labor strike over a "major" dispute, because the RLA "does not provide a process for a final

decision like that of the Adjustment Board in a 'minor dispute' case." *Id.* at 42 n. 24, 77 S.Ct. at 641 n. 24.

In the case at bar the underlying labor dispute is a "minor" dispute. The essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract," or whether the dispute is "over the meaning of an existing collective bargaining agreement." *Id.* Here, the strike threat mailgram from UTU is the best indication that the dispute is the latter rather than the former. UTU's mailgram demanded a halt to MOPAC's "trespass on our collectively bargained agreements and our seniority." *Finding of Fact No. 14.* UTU's reliance on the collective bargaining agreements and the seniority provisions therein lead to the conclusion that the dispute is arguably and reasonably susceptible to resolution by reference to the contracts between the parties. *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 655 F.2d 155, 158-59 (9th Cir. 1981); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972); *International Brotherhood of Teamsters, etc. v. Braniff International Airways, Inc.*, 437 F.2d 1272, 1274 (5th Cir. 1971).

UTU argues that the reference in the mailgram to the exhaustion of UTU's "patience and goodwill in attempting to have [MOPAC] stop the use of MKT employees" on KATY trains running over MOPAC lines, makes this a "major" dispute. *Finding of Fact No. 14.* UTU contends that this refers to efforts to negotiate a new contract or to change the existing collective bargaining agreement. However, the language relied upon is ambiguous at best and does not deviate from the basic position of UTU expressd in the mailgram—that MOPAC is breaching the collective bargaining agreements *currently in effect* by allowing KATY employees to operate KATY's trackage rights over MOPAC lines. The language relied upon by UTU does not convince this Court that what UTU was

actually trying to do was to bargain for a new or altered contract.

UTU next argues that the allegations in its counterclaim make this a "major" dispute. In ¶ 9 of UTU's counterclaim against MOPAC, UTU alleges that an "actual and objective working condition" of the relationship between MOPAC and UTU was that trains operating over MOPAC tracks or serving customers on those tracks be manned by MOPAC crews. UTU further alleges that MOPAC unilaterally changed that working condition by allowing KATY crews to operate KATY trains on MOPAC lines. *Counterclaim ¶ 14.* The UTU contends that this creates a "major" dispute because MOPAC violated § 152, Seventh [5] and § 156 [6] of the RLA by making such changes without following the procedure in § 156. 45 U.S.C. § 152, Seventh; § 156.

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[5] 45 U.S.C. § 152, Seventh, provides:

> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

[6] 45 U.S.C. § 156, provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended (change in agreements) affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended changes has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

The law is clear that a change in "working conditions" which violates § 152, Seventh and § 156, is a "major" dispute where the contract involved is not "reasonably susceptible" to an interpretation that the change is justified or permitted by the contract. *Trans World Airlines*, 655 F.2d at 157-59. *See also Burlington Northern*, 458 F.2d at 357; *Braniff International Airways*, 437 F.2d at 1274. However, this rule is not applicable here, where the ICC's approval of the trackage rights arrangement exempts MOPAC from its duty under § 152, Seventh and § 156, at least with respect to the crewing provisions of the trackage rights agreement.

The ICC's exemption power is found in § 11341(a) of the Interstate Commerce Act, which provides, in pertinent part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. . . . A carrier, corporation, or person participating in [an] approved or exempted transaction *is exempt* from the antitrust law and *from all other law*, including State and municipal law, *as necessary to let that person carry out the transaction*, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a). The exemption provided by § 11341(a) is self-executing, *Chicago and Northwestern Railway Co.*, 314 F.2d at 432, but here the ICC twice made it clear that MOPAC and KATY are exempt from any requirements of the RLA concerning the crew selection clause in the approved trackage rights agreement. *See Findings of Fact Nos. 18, 22, 23. See Chicago & North Western Railway Co.*, 314 F.2d at 431-32 (no express or implied exception of RLA provisions from ICC exemption power).

It is the opinion of this Court that § 11341(a) exempts MOPAC from any duty under RLA § 152, Seventh or § 156 concerning the use of KATY employees on MOPAC

lines. *See also* Part I, 2, b, *infra*. UTU argues that this Court must make a *de novo* determination of whether such an exempiton is "necessary to let [MOPAC] carry out the transaction. . . ." 49 U.S.C. § 11341(a). Although such a determination may be necessary where the ICC has failed to expressly make any findings concerning exemption, *see Chicago and Northwestern Railway Co.*, 314 F.2d at 432, it is not necessary here where the ICC has expressly relieved MOPAC from the obligations of the RLA. To the extent the UTU challenges this action of the ICC, it may not do so in this forum. The United States Courts of Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC. 28 U.S.C. § 2342. UTU's reliance on *Texas and New Orleans Railroad Company v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508, 9 L.Ed.2d 500 (1963), *reh. denied*, 375 U.S. 871, 84 S.Ct. 28, 11 L.Ed.2d 101 (1963), is misplaced, because in that case there was no express finding by the ICC that the provisions of the RLA should be exempted. Moreover, to the extent that *Texas and New Orleans Railroad* stands for the proposition that § 11341(a) cannot operate to relieve a carrier of its obligations under the RLA, this Court respectfully rejects that proposition.

Finally, UTU argues that this dispute cannot be considered a "minor" dispute, because if MOPAC is exempt from the requirements of the RLA, then MOPAC cannot be required to submit this dispute to a final and binding decision by the NRAB. More importantly, UTU argues that because MOPAC need not submit the dispute to the NRAB, the rationale for excepting strikes over "minor" disputes from the prohibitions of the NLGA is absent, and, therefore, the NLGA applies to prohibit an injunction against the threatened strike. This is an interesting argument, but it is the opinion of this Court that, assuming MOPAC is exempt from the RLA requirement that

"minor" disputes be submitted to the NRAB, it does not follow that the rationale for excepting "minor" disputes from the prohibitions of the NLGA is absent.

The rationale is not absent, because the ICA provides "a process for a final decision," *Chicago River*, 353 U.S. at 42 n. 24, 77 S.Ct. at 641 n. 24, and here the ICC rendered a final decision as to the validity of KATY's use of KATY employees to operate its trackage rights. In *Chicago and North Western Railway Co.*, the Eighth Circuit made it clear that the ICC has jurisdiction to determine labor disputes, whether "minor" or "major", in connection with its power to approve mergers and consolidations. 314 F.2d at 431. Here the ICC resolved the crew selection question against UTU, and to that extent the jurisdiction of the NRAB is displaced. Just as the NLGA is excepted to enforce the labor jurisdiction of the NRAB, in this case the NLGA is excepted to enforce the labor jurisdiction of the ICC.[7]

In sum, this is a "minor" dispute and § 104 of the NLGA does not deprive this Court of jurisdiction to enjoin defendants' threatened strike.

b. EVEN IF THIS IS A "MAJOR" DISPUTE, THE PROHIBITIONS OF THE NORRIS-LaGUARDIA ACT ARE DISPLACED BY THE POWER AND JURISDICTION OF THE ICC UNDER THE INTERSTATE COMMERCE ACT

This Court finds it necessary to rest this Court's conclusion that the NLGA does not prevent an injunction against UTU's threatened strike from issuing, upon an

[7] It may be argued that the analogy between the NRAB jurisdiction over "minor" labor disputes and the ICC jurisdiction over labor disputes is not perfect as it relates to the NLGA, because the ICA was not "adopted as a part of a pattern of labor legislation." *Chicago River*, 353 U.S. at 42, 77 S.Ct. at 641. This argument is dealt with in section b, *infra*.

alternative basis: Even if this is a "major" dispute, MOPAC was exempted from any RLA duty to negotiate over the selection of crews and the NLGA must give way to protect the integrity of the jurisdiction and orders of the ICC under the ICA.

As discussed *supra*, it is the opinion of this Court that MOPAC is exempted under § 11341(a) of the ICA, 49 U.S.C. § 11341(a), from the requirements of the RLA with respect to "major" disputes. RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156. It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it relates to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve transactions, including trackage rights agreements, between carriers. 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.[8] *Norfolk & West-*

[8] UTU argues that § 11347, 49 U.S.C. § 11347, which provides that "[n]otwithstanding this subtitle, the arrangements [to impose employee protective conditions] may be made by the rail carrier and the authorized representative of its employees," authorizes MOPAC and UTU to negotiate over the crew selection issue. However, the crew selection clause in the trackage rights agreement is a material term of the agreement which the ICC approved and is not one of the employees protective conditions that may be altered by

ern Railroad Co. v. Nemitz, 404 U.S. 37, 92 S.Ct. 185, 30 L.Ed.2d 198 (1971). Nevertheless, UTU argues that it is still free to strike MOPAC over its refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines.

The authority of the ICC in consolidation and trackage rights proceedings is plenary and exclusive. 49 U.S.C. § 11341(a); *Chicago & North Western Railway Co.*, 314 F.2d at 431. In *Chicago & North Western Railway Co.*, the Eighth Circuit held that this power includes jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. *Id.* There the union argued that it had a right to strike over five jobs which were being eliminated, and other seniority problems, pursuant to an ICC-approved merger. The issue in that case was whether disputes arising from the merger must be resolved according to the procedures of the RLA or the arbitration provisions of the ICC order approving the consolidation in question. In affirming the district court's ruling that the ICC order controlled and that the RLA procedures were inapplicable, the Court of Appeals extensively discussed the relationship between the jurisdiction of the ICC over consolidations and the rights of employees affected thereby. *Id.* at 427-33.

The *Chicago & North Western Railway Co.* Court held that the ICC has the right to make provisions, in approving consolidations, that conflict with existing collective bargaining agreements and RLA procedures. *Id.* at 427. The Court found the "major"/"minor" analysis inapplicable because the RLA had been exempted by the ICC. *Id.* at 429. Accordingly, the ICC had the power to authorize changes in working conditions and to resolve

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the carrier and the employee representative. Moreover, the use of the term "may" in the provision relied upon by UTU suggests that it is permissive rather than mandatory. Therefore, MOPAC does not have any *duty* to negotiate with UTU under that provision.

conflicting seniority rights free from the constraints of the RLA. *Id.*

Moreover, the Court found support for its conclusion in the legislative history of the ICA. The Court pointed out that the Harrington amendment to the ICA, which would have brought about a freeze of existing employees in their job rights and thereby would have threatened to prevent all consolidations, *id.* at 430, was defeated. The Court concluded that Congress intended the jurisdiction of the ICC to displace RLA procedures in merger-related disputes:

> Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

Id. at 431. Several years later the Eighth Circuit read *Chicago & North Western Railway Co.* as holding that "the employees did not have a right to strike over merger-related disputes." *General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279, 1285 (8th Cir. 1977).

UTU relies heavily[9] upon *Texas & New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d

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[9] UTU also relies upon *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960). However, this Court finds *Order of Railroad Telegraphers* to be inapposite. There, the Court held that the NLGA prevented the district court from enjoining a strike by the Order of Railroad Telegraphers. The Order of Railroad Telegraphers sought to force the carrier to negotiate an amendment to the contract to prevent the dismissal of any employees as a result of the carrier's consolidation of several stations. The case is not apposite, however, because the ICC was not involved and had not issued any final orders governing the consolidation. Indeed, the carrier was

151 (5th Cir. 1962). In that case the carrier had given the union notice, under RLA § 156, of an intended change in operation. The carrier had also applied for and received approval from the ICC to carry out the change, which approval imposed certain employee protective conditions. However, the union threatened to strike after the carrier put the approved changes into effect and the carrier then brought suit to enjoin the strike. The Court affirmed the district court's denial of an injunction and rejected all arguments that the NLGA was displaced by the provisions of the ICA.

First, the *Texas & New Orleans Railway Co.* Court rejected the argument that the exemption power of the ICC exempted the NLGA. The Court held:

> This section [11341(a)] relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e., the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but to the power of the court to grant injunctive relief.

307 F.2d at 156. Second, the Court rejected the argument that the ICC's power to impose employee protective conditions under § 11347 of the ICA should be treated as an exception to the NLGA. The Court viewed such conditions as an imposition of duties on the carrier only and not as a prohibition against the union "from gaining further rights in the transaction through the use of its own economic power—the strike." 307 F.2d at 157. Finally, the Court rejected the argument that the NLGA must give way to the authority of the ICC to approve transactions. *Id.* at 159.

seeking approval from several state agencies. The Court stated: "Nothing the union requested would require the railroad to violate any valid law or the valid order of any public agency." *Id.* at 340, 80 S.Ct. at 767. Here, on the other hand, MOPAC would be violating a material term of the ICC's approval of the trackage rights agreement if it took any action to require the use of MOPAC employees on KATY trains operating its trackage rights.

This Court disagrees with the result reached in *Texas & New Orleans Railway Co.* Although *Chicago & North Western Railway Co.* is not on point,[10] it is the opinion of this Court that the underlying concern in *Chicago & North Western Railway Co.* warrants rejection of *Texas & New Orleans Railway Co.* In the *Chicago & North Western Railway Co.* case, the Court was concerned with the consequence of narrowly restricting the scope of the ICC's power—labor unions could effectively block many or all consolidations which are approved by the ICC. The Harrington amendment was rejected to avoid such a consequence and, therefore, the Court interpreted the ICC's jurisdiction broadly to displace the applicability of the RLA. Similarly, it is the opinion of this Court that the applicability of the NLGA must be displaced by the power of the ICC over transactions like the one here, in order to avoid consequences which Congress intended to prevent.

The Supreme Court has stated that it will constrict the NLGA's broad prohibitions "in narrowly defined situations where accommodation of that Act to specific congressional policy is necessary." *Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702, 726, 102 S.Ct. 2673, 2685, 73 L.Ed.2d 327 (1982). Congress gave the ICC

[10] There are two (2) problems with applying *Chicago & North Western Railway Co.* to this case. First, UTU's dispute is not covered by any of the arbitration provisions imposed by the ICC. *See N & W Conditions* Article 1, §§ 4, 11. *See also Finding of Fact No. 8.* Second, that case did not deal with the NLGA question. *Chicago & North Western Railway Co.* was a declaratory judgment action, rather than an action to obtain injunctive relief from a threatened strike. *See also Chicago & North Western Railway Co.*, 314 F.2d at 433.

exclusive and plenary authority to approve certain transactions which are in the public interest. In so doing, Congress specifically intended the ICC to authoritatively resolve labor disputes arising from rail consolidations "in order that economically desirable mergers not be obstructed." *International Assn. of Machinists and Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 559 n.15 (1st Cir. 1972). The legislative history of the ICA evidences this intent. *Id.* Moreover, as the ICC stated in its October 19, 1983, decision:

> If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, *our jurisdiction to approve transactions requiring changes of the working conditions of any employee would be substantially nullified.* Such a result would be clearly contrary to congressional intent.

F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) (emphasis added). *See Finding of Fact No. 23.*

In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accommodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Finding of Fact No. 6.* UTU does not contend that it did not have

adequate opportunities to object to any provision of the transaction, including the trackage rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection.[11] In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give—the right to operate KATY trains that run over MOPAC lines. If MOPAC gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because § 11347 requires the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike.

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[11] Here, according to the ICC, UTU did not specifically object to the crewing provisions of the trackage rights agreement at any time during the approval proceedings. F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) at 8-12. *See Finding of Fact No. 23. See also supra*, note 4. UTU disputes this finding, but it matters not because the question of whether UTU objected to the crewing provisions of the trackage rights agreement is not material to this Court's resolution of the NLGA problem.

The Court is aware that *dicta* in various Supreme Court decisions indicates that exceptions to the prohibitions of the NLGA will be found only where necessary to accommodate other Congressional objectives embodied in so-called "labor legislation". *Chicago River*, 353 U.S. at 42, 77 S.Ct. at 641. The ICA was not enacted "as a part of a pattern of labor legislation," *id.*, but because the ICC has jurisdiction over labor disputes in connection with consolidation proceedings, excepting the NLGA in the case at bar does not result in a great departure from established doctrine. Indeed, the following passage from *Chicago River* can be read as supporting the result reached by this Court:

> We hold that *the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes.* There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

353 U.S. at 40, 77 S.Ct. at 640 (emphasis added). Here, the NLGA must be accommodated to the ICA in order to preserve the obvious purpose of giving the ICC jurisdiction over railroad consolidation proceedings.

c. MOPAC HAS NOT VIOLATED SECTION 108 OF THE NORRIS-LaGUARDIA ACT

One final argument of UTU is that even if § 104 of the NLGA is inapplicable here, injunctive relief is still not appropriate because MOPAC violated § 108 of the NLGA. UTU contends that MOPAC violated § 108 by failing to negotiate with UTU or submitting this dispute to the National Mediation Board or to voluntary arbitration. *See generally, Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo, Peoria & Western Railroad*, 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 534 (1944).

UTU's argument must be rejected, however, because § 108 requires a complainant to "make every *reasonable*

effort to settle" the dispute. 29 U.S.C. § 108 (emphasis added). In the case at bar the ICC conclusively determined that KATY may use its own employees on its own trains over MOPAC lines. Because the ICC conclusively determined the dispute in the case at bar, it would not be reasonable for MOPAC to negotiate, mediate or arbitrate with the UTU concerning the selection of forces to operate the trackage rights.

d. SUMMARY

In sum, this Court holds that the anti-injunction provisions of the NLGA do not deprive this Court of jurisdiction to enjoin UTU's threatened strike. Two (2) alternative rationales support this holding: first, this is a "minor" dispute within the meaning of the RLA; and second, even if this is "major" dispute within the meaning of the RLA, § 104 of the NLGA is displaced to preserve the purposes and objectives of the ICC's jurisdiction over labor disputes in consolidation proceedings. In addition, this Court holds that MOPAC did not violate § 108 of the NLGA.

3. PRELIMINARY INJUNCTION CRITERIA

In *Dataphase Systems, Inc. v. C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), the Court identified the following four (4) factors which must be considered by a district court in passing on a motion for a preliminary injunction:

> (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Id. at 114. These four (4) criteria weigh in favor of granting preliminary injunctive relief against defendants' threatened strike.

First, it is clear that a strike by UTU against MOPAC is very likely to result in irreparable harm to MOPAC. *Finding of Fact No. 24.* UTU does not even attempt to contest this factor in its opposition to the motion.

On the second element, the balance between the threat of irreparable harm and the harm that will be inflicted on defendants if a preliminary injunction is granted, MOPAC suggests that the harm to UTU will be modest in view of two facts: 1) UTU has consented to a continuance of the temporary restraining order several times; and 2) the N & W Conditions provide UTU employees with adequate protection from the adverse effects of KATY employees operating the trackage rights. *See Findings of Fact Nos. 15, 8.* This Court agrees. The protective conditions provide adversely affected employees with displacement allowances, dismissal allowances and fringe benefits. Moreover, the trackage rights have been operated by KATY with KATY employees for over a year now. Any harm on UTU members has most likely already occurred. Any additional harm that might be caused by enjoining the threatened strike will not be irreparable.

The third factor, probability of success on the merits, is not a problem here. This Memorandum resolves UTU's primary defense, that this Court lacks jurisdiction to enjoin UTU's threatened strike, in favor of the carriers. *See supra.* Moreover, this Memorandum grants plaintiffs' motion for summary judgment on defendants' counterclaim, *see infra.* Therefore, success on the merits is likely.

Finally, the public interest in uninterrupted freight shipment weighs in favor of granting the motion. *See Finding of Fact No. 24.*

Accordingly, plaintiffs' motion for a preliminary injunction is granted.

II MOTION TO REFER ISSUES TO INTERSTATE COMMERCE COMMISSION

Prior to the October 19, 1983, decision of the ICC, *see Finding of Fact No. 23,* UTU moved to refer two (2) issues to the ICC pursuant to 28 U.S.C. § 1336(b) and the doctrine of primary jurisdiction. *See United States v. Western Pacific Railroad Co.,* 352 U.S. 59, 63-65, 77 S.Ct. 161, 164-66, 1 L.Ed.2d 126 (1956); *Iowa Beef Processors, Inc. v. Illinois Central Gulf Railroad Co.,* 685 F.2d 255 (8th Cir. 1982). UTU phrased these two (2) issues, as follows:

> 1. Did the ICC by its order in *Union Pacific—Control—Missouri Pacific Western Pacific,* 366 I.C.C. 462 (1982), intend to exempt under 49 U.S.C. § 11341(a) the carriers involved in that transaction from the requirements of the Railway Labor Act, 45 U.S.C. § 151 *et seq.,* that they negotiate with rail labor those changes in rules and working conditions which may be required to implement the ICC's permissive authority?
>
> 2. Did the ICC by its order in *Union Pacific—Control—Missouri Pacific Western Pacific,* 366 I.C.C. 462 (1982), require the Missouri Pacific Railroad (MoPac) and the Missouri-Kansas-Texas Railroad (MKT) both to give advance notice to all MoPac and MKT employees who might be affected by the implementation of the Trackage Rights granted in Finance Docket No. 30,000 (Sub-No. 25) and, if requested, to negotiate an implementing agreement with those employees?

Motion of Defendants To Refer Issue To The Interstate Commerce Commission at 1-2. Following the ICC's October 19, 1983, decision UTU admits that its motion to refer is moot as to issue #1. However, it contends that its motion is not moot as to issue #2. Plaintiffs argue that the ICC's recent decisions also mooted the motion as to issue #2.

Essentially, this Court must decide whether the ICC's orders determined issue #2. UTU contends that the ICC's most recent order did not address the impact of Article 1, § 4 of the N & W Conditions, *see Finding of Fact No. 8*, and the right of UTU to require MOPAC to negotiate an implementing agreement with respect to the selection of forces problem. However, it is the opinion of this Court that the ICC's most recent decision makes it clear that the Article 1, § 4 requirement of notice and negotiation is inapplicable with respect to the selection of forces issue.

In its October 19, 1983, decision the ICC noted defendants' "notice and negotiation" argument, but rejected it. *See Findings of Fact Nos. 22, 23.* Moreover, the ICC held that UTU has *no* right to participate in the crew selection process and that MOPAC/KATY could implement their trackage rights agreement without *any* other approval. *Finding of Fact No. 23.* Finally, the ICC's discussion concerning the interpretation of labor conditions imposed in connection with an approved transaction, further suggests that Article 1, § 4 is not applicable to the crew selection issue:

> [S]tandard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) at 6. Read in the context of the ICC's approval of the

crew selection provisions of the trackage rights agreements, Article 1, § 4 is not applicable to that issue.[12] *See also Brotherhood of Maintenance of Way Employees v. Interstate Commerce Commission*, 698 F.2d 315, 317 n.6 (7th Cir. 1983) ("The adoption of standard conditions, routinely imposed, often results in incorporation of superfluous provisions having no application to the particular case under consideration.")

Arguably, a portion of issue #2 was not decided by the ICC. The issue phrased by UTU is broad enough to cover the question of whether plaintiffs have any duty under Article 1, § 4 to give notice and negotiate an implementing agreement with respect to *issues other than the selection of forces. See Finding of Fact No. 17.* There is no need to refer this question to the ICC, however, because there does not seem to be any ambiguity about this question in the ICC's orders and because the central dispute between the parties, as evidenced by the positions of the parties taken in their memoranda, concerns the narrower question of plaintiffs' duty to negotiate about selection of forces.

Accordingly, UTU's motion is denied.

III CROSS-MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFFS' COMPLAINT

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he

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[12] Thus, as to plaintiffs' trackage rights agreement, the effect of the ICC's orders is that the following sentence is inapplicable:

> Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for *the selection of forces* from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

N & W Conditions, Article 1, § 4 (emphasis added). *See Findings of Fact Nos. 8, 17.*

can "show that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). *See also Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). In passing on a motion for summary judgment, a court is required to view the facts and inferences that may be derived therefrom in the light most favorable to the non-moving party. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983); *Vette Co. v. Aetna Casualty and Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The burden of proof is on the moving party and a court should not grant a summary judgment motion unless it is convinced that there is no evidence to sustain a recovery under any circumstances. *Buller*, 706 F.2d at 846. However, under Rule 56(e), a party opposing a motion for summary judgment may not rest upon the allegations of his pleadings but "must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P.* 56(e). *See also* 10A Wright, Miller and Kane, *Federal Practice and Procedure: Civil 2d*, § 2739 (1983).

Plaintiffs moved for summary judgment on their complaint. Defendants filed a cross-motion for summary judgment. Plaintiffs argue that this is a "minor" dispute, that plaintiffs are exempt from the requirements of the RLA, and that this Court has jurisdiction to enjoin defendants' threatened strike. Defendants argue that this is a "major" dispute, that plaintiffs violated the RLA, and that sections 104 and 108 of the NLGA bar this Court from enjoining the strike.

It is obvious that this Memorandum determines several of the legal issues raised by the cross-motions for summary judgment. Moreover, neither party suggested that there are any genuine issues of material fact with respect to plaintiffs' complaint. Nevertheless, the summary judgment motions relating to plaintiffs' complaint will not be ruled upon at this time for the following reasons.

The parties, in their memoranda, utilize the "shotgun" method of argument. Accordingly, this Court found it difficult to answer each of the parties' contentions in a systematic and orderly fashion. The positions of the parties, especially UTU, seem to change with each response or reply to the prior memorandum. Moreover, the record in this case is remarkably inadequate and incomplete. In several instances the parties rely on documents that are not even in the file! This is not an adequate basis upon which to enter summary judgment on a claim for permanent injunctive relief.

The rulings of this Court on the legal questions related to the NLGA are not subject to further argument. Rather than rule on the parties' cross-motions for summary judgment at this time, however, it is the opinion of this Court that the parties should reevaluate their summary judgment positions in light of this Memorandum. The parties are also ordered to meet and confer for the purpose of: 1) attempting to settle this dispute or come to an understanding as to what, if any, legal or factual issues remain undetermined; 2) stipulating to as many undisputed and necessary facts as possible; 3) organizing the complete documentary record in this case into a presentable form; and 4) determining whether any oral testimony will be necessary on any remaining issue, including the question of whether the preliminary injunction issued herein should be made permanent. The parties shall meet and accomplish these purposes within ten (10) days of the date of this Memorandum. The parties shall appear before this Court on Friday, March 16, 1984, at 10:00 a.m., to report on the results of their efforts. The trial of this case is reset for March 26, 1984.

IV PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

Plaintiffs' motion for summary judgment on defendants' counterclaim presents a different situation. It can be determined solely by reference to the ICC's orders in

this case and the arguments of the parties are more clear.

Count I of defendants' counterclaim alleges that MOPAC violated § 156 of the RLA by unilaterally changing the objective working conditions of its employees without following the procedures of § 156. This Court agrees with plaintiff, as discussed *supra*, that the ICC's actions exempt MOPAC from the requirements of the RLA. 49 U.S.C. § 11341(a). Accordingly, plaintiffs' motion is granted as to Count I of defendants' counterclaim and said count is dismissed.

Count II of defendants' counterclaim alleges that both MOPAC and KATY violated the orders of the ICC by failing to comply with the N & W Conditions, specifically Article 1, §§ 2 and 4, in connection with the use of KATY employees to operate the trackage rights. Again, as discussed *supra*, this Court agrees with plaintiffs that the ICC orders in question make it very clear that those sections of the N & W Conditions were not intended to apply to the crew selection provisions of the trackage rights agreements. To the extent UTU takes issue with the actions of the ICC, this is not the proper forum for resolution of that issue. 28 U.S.C. §§ 2321(a), 2342. Accordingly, plaintiffs' motion is granted as to Count II of defendants' counterclaim to the extent that that count seeks to force plaintiffs to negotiate the selection of forces to perform the trackage rights authorized by the ICC.

However, Count II of defendants' counterclaim can be read as requesting this Court to order plaintiffs to comply with N & W Conditions, Article 1, § 4, with respect to *issues other than crew selection*. For example, there is no indication that the ICC made the first sentence of the second paragraph of Article 1, § 4, inapplicable to this transaction.[13] *Cf. supra*, note 12. It is clear that plaintiffs

[13] The first sentence of the second paragraph of Article 1, § 4, provides:

> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to *application of the terms of conditions* of [these N & W Conditions] shall commence immediately and continue for not more than twenty (20) days from the date of notice.

N & W Conditions, Article 1, § 4 (emphasis added). *See Findings of Fact Nos. 8, 17.*

did not give the twenty (20) days notice required by Article 1, § 4. *See Findings of Fact No. 17.* It is also clear that KATY complied with Article 1, § 4 with respect to its own employees. *See Findings of Fact No. 21.* But the extent to which MOPAC so complied, with respect to its own employees, is not clear on this record. This may present a question of fact and, therefore, plaintiffs' motion is denied as to this aspect of Count II of defendants' counterclaim. The parties' conferences, pursuant to Part III of this Memorandum, shall address Count II of defendants' counterclaim.

ADDENDUM B

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30532

MAINE CENTRAL RAILROAD COMPANY,
GEORGIA PACIFIC CORPORATION, CANADIAN PACIFIC LTD.
AND SPRINGFIELD TERMINAL RAILWAY COMPANY—
EXEMPTION FROM 49 U.S.C. 11342 and 11343

Decided: August 22, 1985

[Served September 13, 1985]

By petition filed April 10, 1985, the United Transportation Union (UTU) seeks reconsideration of our decision served March 20, 1985. That decision granted the petition of Maine Central Railroad Company (MEC), Georgia Pacific Corporation (GP), Canadian Pacific Ltd. (CP), and Springfield Terminal Railway Company (ST) for exemption under 49 U.S.C. 10505 from the provisions of 49 U.S.C. 11342 and 11343(a)(2). MEC replied to the petition. We affirm our prior decision.

Under the exempted transactions, MEC will lease to GP four specific lines of railroad near Woodland, ME. GP has contracted with ST to operate and maintain the lines. ST will act as the switching carrier at Woodland and CP will be the initial line haul carrier for GP's Woodland traffic moving beyond Calais, ME. GP may route its traffic for the account of either MEC or CP, but MEC and CP have agreed that CP will interline all of the Woodland traffic at Milltown Junction and haul it

over a northwestern route. Thus GP's Woodland traffic will no longer move southwest over MEC's Calais Branch, but MEC and CP will continue to compete for GP's traffic.

In granting the leasing and pooling exemptions, the Commission found that regulation was not necessary to carry out the rail transportation policy because, *inter alia*, implementation would result in more responsive transportation of Woodland traffic and more efficient rail operations. The transaction was found to be of limited scope because the lease and operation involved only approximately 12 miles of track and the pooling of a single shipper's traffic. The Commission found that there would be no abuse of market power because of alternative truck transportation available to shippers on the Calais Branch, and noted that no shippers opposed the petition.

UTU urges reconsideration and revocation of the exemption because the corporate entities are involved in a "shell game" to enable Guilford Transportation Industries, Inc. (GTI)[1] to lower its operating costs by reducing employee obligations. UTU states that the wages of ST employees are lower than those of MEC employees, and the ST labor agreements are less restrictive than agreements involving MEC employees. Furthermore, the transaction would enable GP, the largest shipper, to have its traffic handled by ST and eventually MEC operations over the Calais Branch would be abandoned.

UTU also believes that the Commission erred in imposing only the conditions for the protection of railway employees in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980) (*Mendocino*). These conditions were imposed on the section 11343 transactions, but not in connection with the pooling arrangement.

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[1] MEC is a wholly owned subsidiary of GTI. ST is a subsidiary of Boston & Maine Corporation, another wholly-owned subsidiary of GTI.

UTU argues that this is an unusual transaction requiring imposition of the conditions in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*) on all transactions approved in this proceeding. It claims that the transactions are unusual because of severe employment disruption and diversion of traffic from the line.

UTU states further that MEC is a party to the Washington Job Protection Agreement (WJPA), which requires carriers to give advance notice and negotiate the selection of forces when they unify, pool or consolidate their previously separate facilities or operations. Imposing *Mendocino*, UTU argues, authorizes the carriers to deny employees their statutory and contractual WJPA notice and negotiation rights. UTU states that the *New York Dock* conditions would restore employees' notice and negotiation rights.

MEC argues that reconsideration and revocation are not appropriate, because UTU has not shown that regulation is required to carry out the rail transportation policy, 49 U.S.C. 10101a as required by 49 U.S.C. 10505(d), or that the Commission erred in its findings concerning limited scope and market power. MEC argues that even if the purpose of the transaction was to lower GTI's operating costs, this is a proper purpose, because one of the principal goals of the Staggers Rail Act of 1980 (Staggers Act) was to encourage railroads to earn adequate revenues. MEC contends however, that the main reason for the transaction was to satisfy the shipper, GP.

MEC states further that abandonment of the Calais Branch is a matter distinct from the transactions at Woodland. MEC has neither abandoned nor filed to abandon the Calais Branch.

MEC agrees that there is a difference in preconsummation requirements between *Mendocino* and WJPA and *New York Dock*. It states that the appropriateness of the *Mendocino* conditions for lease transactions has been upheld in court. *Railway Labor Executives Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982) *RLEA*. MEC further disputes UTU's characterization of the transaction as an unusual one requiring greater protection than the *Mendocino* conditions. As indicated in UTU's own statement, only 5 employees will be affected.

Finally, MEC argues that UTU has not shown that *Mendocino* results in the impairment of any collective bargaining agreement. Citing UTU's own statement, MEC states that *Mendocino* itself requires the preservation of all rights under these agreements.

DISCUSSION AND CONCLUSIONS

There are two issues that are raised in this appeal that we need to resolve: (i) whether it was proper to grant the exemption and impose the *Mendocino* conditions; and (ii) the effect that our imposition of employee protective conditions has on other rail labor agreements and laws.

We determined, in our prior decision, that regulation was not necessary to carry out the rail transportation policy, that the transaction was of limited scope, and that there was no potential for the abuse of market power. While UTU has not specifically directed its appeal to any one of these findings, the appeal appears to bear most directly on the rail policy finding.

UTU is concerned that this transaction may adversely affect traffic over the Calais Branch and eventually cause that line to be abandoned. There is no evidence of harm to the Calais Branch, nor is there a pending abandonment application. In addition, if MEC wanted to abandon this line, it would first have to comply with 49 U.S.C. 10903-10906, and need approval from this agency. Further, it is appropriate for a railroad to take steps to reduce its operating costs by directing traffic over a more efficient, less costly route. Reducing costs complies with rail transportation policy by fostering sound economic conditions in transportation [49 U.S.C. 10101a(5)] and encouraging efficient management [49 U.S.C. 10101a(10)].

In addition, the rail transportation policy does not require a carrier to route traffic over a particular line to prevent abandonment or to maintain jobs. Rather than contravening the rail transportation policy, this exemption promotes its goals by minimizing the need for Federal regulatory control over the rail system, expediting regulatory decisions, and reducing barriers to entry, in addition to those previously noted. Rail transportation policy does require that operating economics and efficiencies not be accomplished solely at the expense of rail labor. However, that objective will be met by our imposition of labor protective conditions if, as labor fears, MEC applies for authority to abandon the Calais Branch at some future date.

UTU's petition does not challenge the limited scope or lack of market power findings. We therefore affirm our prior finding that exemption is warranted here.

We also affirm the imposition of the *Mendocino* conditions for protection of employees affected by this lease transaction. Under 49 U.S.C. 10505(g)(2), the Commission may not exercise its authority under section 10505 to relieve a carrier of its obligation to protect the interests of employees as required by 49 U.S.C. Subtitle IV. In this case, where the leasing by one carrier of another carrier's property was exempted from the requirements of 49 U.S.C. 11343(a)(2), *et seq.*, labor protection is required by 49 U.S.C. 11347.[2] It is well settled that the *Mendocino* conditions are appropriate for lease transactions. See *RLEA*, *supra*, affirming the Commission's decision in *Mendocino*.

In RLEA, the Court of Appeals for the District of Columbia Circuit was called upon to determine the effect on

[2] We are not required by statute to impose labor protective conditions on pooling arrangements, and, as previously found, the record does not demonstrate a need for imposition here. Section 11347 mandates labor protection on transactions approved under sections 11344 (referring to the transactions under 11343), 11345 and 11346. Pooling is governed by section 11342.

transactions involving leases and trackage rights of Section 11347 (enacted in the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act)). To the extent pertinent here, section 11347 requires that, in transactions approved under sections 11344-46 (see n. 2, *supra*), the Commission impose employee protective conditions "at least as protective of the interests of employees as the terms imposed [before the 4R Act]." The critical question thus becomes the nature of the protective conditions approved by the Commission before 1976 in trackage rights and lease cases.[3]

The court reviewed the history of job protective arrangements, commencing with the 1936 WJPA (675 F.2d at 1250-51), and found that the Commission had customarily imposed conditions in lease and trackage cases that differed from those imposed in mergers and consolidations. 675 F.2d at 1251. The principal differences were the absence of the 90-day notice and the implementing agreement requirement (sections 4 and 5 of WJPA, n. 3 *supra*) in the conditions imposed in lease and trackage rights case (*id.*).[4] The court found that Congress did not intend "to alter well-established Commission practice with the requirement that the Commission impose

[3] We have previously determined the appropriate level of labor protection for mergers and consolidations in *New York Dock*, *supra*. Those conditions are sought by UTU here. The protections under *New York Dock* and *Mendocino* are for the most part identical. The principal difference is that *Mendocino* does not contain the equivalent of section 4 of the WJPA (requiring 90 days notice prior to a coordination—*Mendocino* requires 20 days notice) or section 5 of WPJA (no coordination could be effective until carrier and employees had reached an implementing agreement). *RLEA*, 675 F.2d at 1250.

[4] The court's factual finding as to the level of protection in pre-1976 lease cases relied in part on the Commission's decision but also on data gathered by the petitioning labor unions which supported the Commission's version of relevant labor history. 675 F.2d at 1251, n. 7.

the [*New York Dock*-type] conditions in trackage rights cases." (675 F.2d at 1254-56). Accordingly, the Commission's *Mendocino* decision, "reflect[ing] an accurate interpretation of the 1976 amendment" (675 F.2d at 1256) was affirmed.

The court recognized that the protection it was approving represented the minimum protection required by Section 11347 and particular lease transactions "may threaten impacts requiring additional protection" (*id.*). The court noted that this was also Commission's position, quoting *Mendocino* (360 I.C.C. at 633): "this does not preclude the consideration in particular cases of greater levels of protection . . . where the need therefore has been specifically established" (675 F.2d at 1256, n. 19). The court went on to "entrust to the Commission" the task of determining when more protection may be needed (675 F.2d at 1256).

UTU contends that greater protection than that normally provided in lease transactions is needed here. But it fails to demonstrate that there are any new or special factors present here requiring a higher level of protection. In fact, this case comes within each of the reasons given by the Commission in the *Mendocino* decision for reduced level of protection in lease transactions (i.e., not requiring in such transactions "substantially advanced preconsummation notice and finalized preconsummation negotiations") (360 I.C.C. at 663). The Commission found "little justification" for these protections where "there are no substantial number of employees likely to be adversely affected by a trackage rights or lease transaction." *Id.* There are only five employees involved here. The Commission continued, "Typically, most of these transactions are not opposed by carriers or members of the shipping public . . ." *Id.* There is neither carrier nor shipper opposition in this case.[5] These

[5] We also observed that the delay of service improvements until labor negotiations on potentially unrelated matters were concluded would not be in the public interest (360 I.C.C. at 663).

statements confirm our view that the *Mendocino* conditions are appropriate here.

UTU contends that the provisions of WJPA should apply because MEC was a signatory of that agreement. UTU's position is inconsistent with *RLEA* and the history of labor protection under the Interstate Commerce Act since at least 1970 and arguably much earlier. As we have described, the *RLEA* court affirmed a Commission determination that the appropriate labor conditions in trackage rights and lease transactions need not include the protections afforded by Sections 4 and 5 of WJPA.[6] Not only did the court determine that the carriers were not bound by WJPA in those transactions, WJPA was not even considered to be material to the determination of appropriate conditions, other than as a significant historical event.[7]

We would be impermissibly overruling *RLEA* and our prior decisions if we were to now impose WJPA sections 4 and 5 on all lease and trackage rights cases involving signatories of WJPA—in effect, the vast majority of such transactions. Such a result would also be inconsistent with the extended pre-1976 labor history relied upon by us in *Mendocino* and the court in *RLEA*. That history showed a consistent Commission policy (accepted by labor) of not giving WJPA section 4 & 5 protection in trackage rights and lease transactions.[8] The absence

[6] The railroads involved in *RLEA*, Baltimore and Ohio Railroad Company and Burlington Northern, Inc., were signatories (through predecessors in the latter case) of WJPA.

[7] WJPA was referred to as a "blueprint for all subsequent job protection agreements" by the court that upheld the Commission's determination of the appropriate protective conditions for mergers. *New York Dock Railway* v. *United States*, 609 F.2d 83, 86 (2d Cir. 1979). Nonetheless, that court did not rely on WJPA in deciding the level of protection. That determination was based on prior Commission action (609 F.2d at 94), as in *RLEA*.

[8] In *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68, (D.C.C. 1971), labor lost an argument that the full protection of WJPA sections 4 and 5 had to be included in the Amtrak protective

of any separate enforceable validity of the WJPA conditions has thus been an accepted aspect of labor relations under the Interstate Commerce Act for a substantial period of time.[9]

Neither the Commission nor the courts have been called upon to articulate the reasons for the disappearance of any separate statute for WJPA.[10]

It may be that, as stated in *Southern*, "the terms of the Washington Agreement were in substance and almost in their entirety among the conditions imposed," 331 I.C.C. at 169. It may be due to the success of labor with Congress and the Commission in achieving a standard required level of conditions that, in the words of the Second Circuit in 1979, "can be fairly characterized as significantly more protective of the interests of railway labor than any previously imposed set employee protective conditions." 609 F.2d at 91. Whatever the reason, it is clear that all concerned parties, labor, management and the Commission, have operated under the assump-

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conditions. 326 F. Supp. at 75-76. See *RLEA*, 675 F.2d at 1256, n. 18.

[9] An early Commission case cited by UTU speaks of the "independent nature of rights" given by WJPA. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 169 (1967). First, we were there talking of the preemptive power of Section 5(11) (now Section 11341), not an issue here. Second, the substance of the WJPA was incorporated in the conditions imposed (the so-called *New Orleans* conditions). Finally, the suggestion that WJPA had an independent stature requiring greater than normal protection was not reflected in the future course of labor history and will not be followed today.

[10] A potential reason for the courts' and the Commission's consistent refusal to impose the higher standard of WJPA to lease and trackage rights transactions is the questionable applicability of WJPA to such transactions. WJPA only applies to "coordinations," a term defined in section 2(a) of WJPA as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or part in their separate facilities . . ."

tion that WJPA was subsumed into or replaced by the labor protective conditions imposed in Commission decisions. The 1976 4R Act (legislation that benefited from plentiful advice from each of these concerned parties) simply reflected the existing state of Commission labor law—that employee organizations sought and received the full measure of their protection from the effects of a Commission approved transaction in Commission proceedings. WJPA, while perhaps relevant as evidence of past practice, was not an independent source of any enforceable protect[ion.]

It is manifest that Congress in 1976 intended the protection afforded labor to be limited by the conditions imposed in the pertinent Commission proceeding. The conditions imposed by the Commission today may contain all or only some of the WJPA conditions (as here), but the imposed conditions are not invalid as including less than all. Therefore, UTU's objection on this ground is without merit.

We should note that similar arguments could be made on the basis of the Railway Labor Act (RLA). A union may contend, for example, that labor is entitled to the 30-day notice provisions of Section 6 of that Act. 5 U.S.C. 156. We believe this would fall in the same category as the WJPA contentions, discussed above. The provisions of RLA are reflected and subsumed in the conditions imposed by the Commission. It is apparent that such has been the assumption of Congress and all the interested parties.

In *Southern Control*, the Commission observed that section 6 of RLA "would seriously impede mergers," if it were not for the protections of WJPA that were essentially incorporated in the Commission's decision. 331 I.C.C. at 171. RLA thus had no independent effect. *Southern Control* was the Commission's response to a Supreme Court directive in *Railway Labor Executives' Association* v. *U.S.*, 379 U.S. 199 (1964), that the Com-

mission clarify the scope of protective conditions imposed in a certain merger. It may be noted that the Court's concern was not with the provisions of RLA or WJPA (except as reflected in the Commission's order), but with the level of employee protection decreed by the Commission in its order. It is that order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved transaction.

Such a result is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration. See *REA Express, Inc.* v. *B.R.A.C.*, 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unaccaptable and inconsistent with section 11341 of our act and with section 7 of the RLA which provides that arbitration awards thereunder may not diminish or extinguish any of our powers under the Interstate Commerce Act.[11]

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[11] For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisions to supercede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions.

It is ordered:

1. The petition of UTU for revocation and reconsideration is denied.

2. This decision is effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Sterrett, Andre, Simmons, Lamboly and Strenio. Commission Lamboley concurred. Chairman Taylor was absent and did not participate in the disposition of this proceeding.

JAMES H. BAYNE
Secretary

[SEAL]

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